IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

JOHN DAVIDSON BOLTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

LUKE McKISSACK
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Hollywood, California 9002
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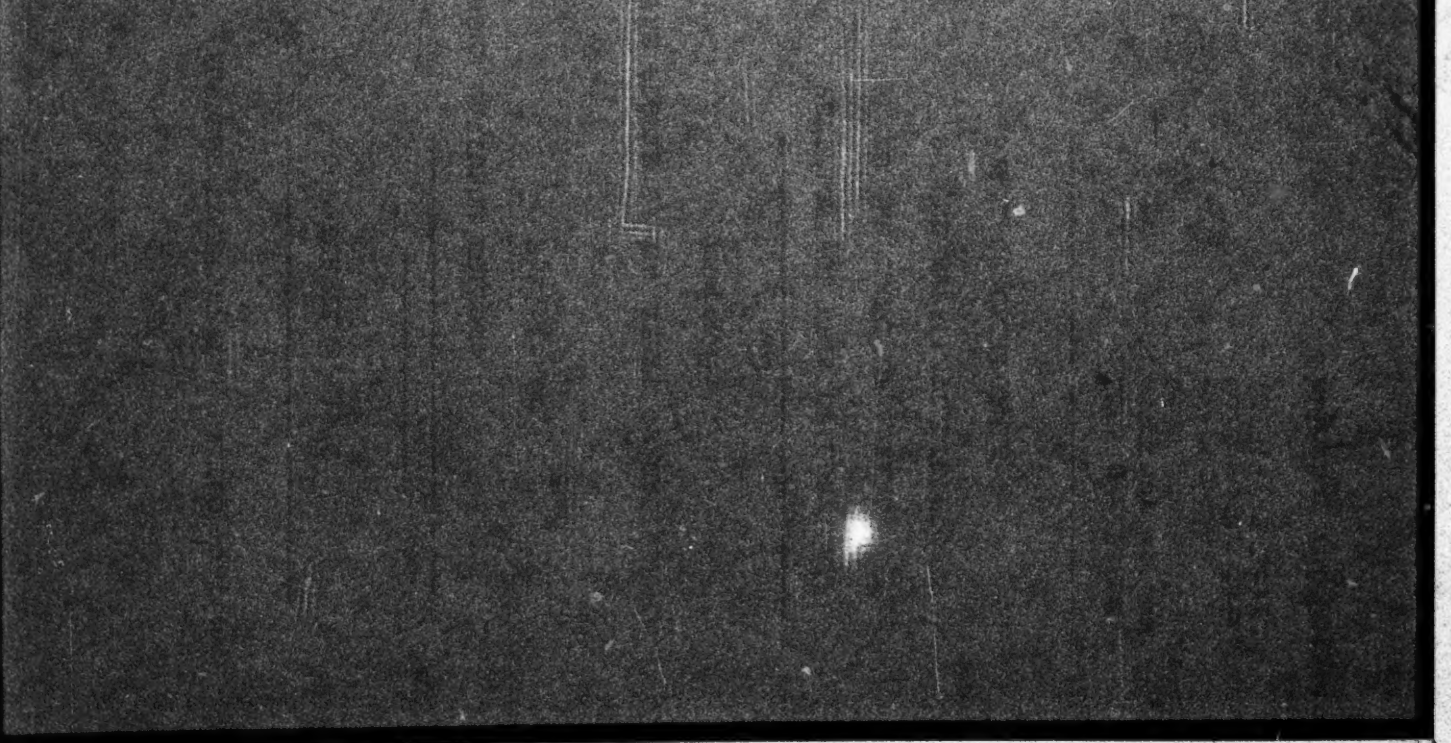
Attorney for Petitioner



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Petitioner, John D. Bolton, respectfully prays for a Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California, to review its judgment affirming Petitioner's conviction.

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OPINION BELOW

Trial in the Los Angeles Superior Court was by the Court sitting without a jury.

The Second District Court of Appeal affirmed the judgment on April 17, 1972. The opinion rendered therein is appended hereto as Appendix "A" (said opinion was certified for non-publication).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petitioner sought relief by way of appeal to the District Court of Appeal, as prescribed under California law. That court affirmed the trial court's judgment. Thereafter, a Petition for Hearing was directed to the California Supreme Court, this State's highest tribunal qualified to hear the issues, and that petition was

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QUESTIONS PRESENTED FOR REVIEW

I

denied on June 15, 1972.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1257 (3).

does the refusal to disclose the identity of an informant, whose statements led to conviction of Petitioner, deny the right to confront the witnesses against the accused and to have compulsory process for obtaining witnesses in his favor in violation of the 6th and 14th Amendments?

II

Does the presence of five police officers at a doorway accosting a person, unclothed roughly from a shower, of possessing contraband and persistently requesting consent to search; and does searching the immediate area around Petitioner when, if he was handcuffed and surrounded by police, would have no chance to destroy evidence or grab a weapon; and does not having any reason to believe the informant and yet relying on him to peek into

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III

Does a sentence based on evidence which is later execluded, violate an individual's right to be free from unusual and cruel punishment as guarantied by the 8th and 14th Amendments?

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STATEMENT OF THE CASE

By complaint filed in the Municipal Court of the Long Beach Judicial District, defendant, John Davidson Bolton, was charged with possessing marijuana for purposes of sale, a violation of California Health & Safety Code §11530.5. Bolton was held to answer at a preliminary hearing on July 8, 1970. An information was filed in the Superior Court of Los Angeles County on July 16, 1970, and an arraignment was held on July 22, 1970. The defendant then moved to dismiss the information under California Penal Code Section 995 and the hearing date was scheduled for August 12, 1970. Said motion was denied on that date, and simultaneously a motion for discovery was noticed for August 14, 1970, which motion was denied on that date. Several postponements were occasioned by the filing of a petition for a Writ of Prohibition. Ultimately, that

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Petition was denied and on November 25, 1970, a hearing was held under Penal Code Section 1538.5. It was denied along with a further motion to divulge the informant.

On March 24, 1971, the cause was tried via a submission on the transcript of the preliminary hearing. The defendant was found guilty of the charge (possession of marijuana for sale). The matter was referred to the probation department and a grant of probation was recommended.

On April 21, 1971, the Court, in lieu of granting the motion for a new trial, reduced the offense to a violation of Section 11530 of the Health & Safety Code (possession of marijuana), and sentenced the defendant to State Prison for the term prescribed by law (1 - 10 years). A timely Notice of Appeal was filed on that date, and the defendant's motions for setting of bail pending appeal, for stay of execution of sentence pending

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appeal, and for sentencing pursuant to Section 1168 of the Penal Code were denied. Defendant was remanded to custody at the California State Prison at Chino. On May 20, 1971, defendant filed an Application for Stay of Execution of a Judgment of Conviction and for Bail Pending Appeal in the Second District Court of Appeal. On May 25, 1971, the District Court of Appeal ordered defendant released upon posting of $3,500.00 bail.

On April 17, 1972, the Second District Court of Appeal affirmed the conviction.

A Petition for Hearing was denied by the California Supreme Court on June 15, 1972.

The case is now properly before this Court on timely filing of Petition for Certiorari.

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STATEMENT OF FACTS

On June 25, 1970, Officer Larry A. Carter received the following information from an undisclosed informant, to wit: [R.T. 7, lines 10-28] that a John Bolton (the defendant) and Ron Diorio possessed a large quantity of kilos of marijuana at 264 1/2 Prospect in the City of Long Beach; that John Bolton lived at this location and that he drove a yellow and blue Helms truck, an English Helms truck; [R.T. 7, lines 17-18.] that the house in question was a rear house; [R.T.7, lines 21-22] that the kilos were in cardboard boxes in a closet of the residence, and further, he received a description of Mr. Bolton as being a white male with long hair, brown hair, hippie-type; [R.T8, lines 12-14.] that the informant thought that the marijuana was to be taken back east and sold; [R.T.25, line 26.] that it was possessed for sale; [R.T. 26, lines 2-3] that there were several boxes full of kilos and that they

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could be found in the closet only; [R.T. 29, lines 1-7] that the officer could not remember whether the informant knew whether or not other persons lived at the residence. [R.T.29, lines 25-27.]

Officer Carter was unable to ascertain the informant's identity, the informant requesting to remain anonymous because he felt that if people found out, his life would be in danger. [R.T. 24, lines 1-3]

Furthermore, the informant did not tell Officer Carter how he knew this information, [R.T.26, lines 5-6.] and the officer did not request this [R.T.26, lines 8-9]. No effort was made to secure information about the person for further contact and no attempts have been made to locate him since [R.T. 26, lines 25-27.]

Pursuant to this information, officers Carter and Gallwas went to the location of 264 1/2 Prospect and observed the residence.

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[R.T.9, lines 24-28.] Nothing unusual occurred that evening, though the officers could see Mr. Bolton several times in the residence as he walked by the windows [R.T.12, lines 9-13]. He further saw Mr. Bolton go near the closet several times but could not tell what he was doing there. [R.T. 12, lines 17-19.] Officers maintained surveillance until early morning hours, at which time they were relieved by uniformed officers (unnamed) at approximately 2:00 or 2:30 A.M. the following morning. [R.T.13, lines 14-17.] No unusual activities occurred and no one left or entered the residence other than Mr. Bolton.

Narcotic officers arrived early the next morning at approximately 8:00 A.M. [R.T. 14, line 9]. Particularly Officers Lacey and Gath. They advised Officer Carter that around 8:00 A.M. or 8:30 A.M., Mr. Bolton left the residence and there had been no activity the rest of the day. [R.T. 14, lines 17-20] Officer Carter returned to the residence

approximately 7:00 p.m. and Mr. Bolton arrived at the residence at approximately 8:15 P.M. driving the same described yellow and blue Helms truck [R.T. 14, lines 17-27.] Officers observed a police motorcycle pull in the alley and park by the van. It was being driven by Officer P. Simms. Mr. Bolton came out of the residence and had a lengthy conversation regarding the van, after which the motorcycle officer left the scene. [R.T.16, lines 6-16.] Mr. Bolton re-entered his residence. Shortly after this, a white male entered the residence, described as being tall and having dark hair, previously unknown by police officers. Further, officers could hear loud conversation and laughing coming from the interior of the residence. During the next approximately hour or hour and fifteen minutes, there was at least one other white male subject who entered the residence. He was described as an older person and believed to

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have come from the front house or from that direction. [R.T.16, lines 20-26.] These were the only times that he specifically recalled people other than the defendant in or about the residence during that time. Officers could not tell exactly how long these persons were there.

At approximately 9:00 P.M., officers observed a white male subject go to the closet area, observed him to reach in, and appear to open one of the boxes and withdraw what seemed to be an object, approximately four inches by eight inches by twelve inches, which was light colored, which he believed to be white. [R.T.17, lines 18-24.] Thereafter, Officer Carter, along with Officer Gallwas went to the front of the location, while Officer Morgan went to the rear with a uniformed officer, while Officer Gath remained at the alley near the windows. Officers approached the front door which was opened

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At approximately 3:00 P.M., officers observed a white male subject go to the c area, observed him to reach in, and appea to open one of the boxes and withdrew wha seemed to be an object, approximately fou inches by eight inches by twelve inches, which was light colored, which he believe be white. [R.T.17, lines 18-18.] There- after, Officer Carter, along with Officer Calimes went to the front of the location while Officer Morgan went to the rear wit uniformed officer, while Officer Eads re- mained at the alley near the windows. Of approached the front door which was opene

outward, and standing open. [R.T. 18, lines 14-21.] No one could be observed in the living room until a few moments later, when Mr. Bolton walked from the area which was later determined to be the bathroom out into the living room area. He was disrobed but for a towel and the officer heard a shower running. [R.T.18, lines 20-27.] Officer Carter identified himself as a police officer, with badge and identification card, and asked him if he was John Bolton. [R.T.18, lines 26-28 and R.T.19, line 1.] After he replied that he was John Bolton, Officer Carter advised him that they were there because they had information that he had a large quantity of marijuana in the closet. He told him that he would like to have his permission to search the residence, and they advised him of his rights, which he read from standard police form P.D. 254. [R.T. 19, lines 11-16.] The Officer advised him that

if he did refuse to allow him to search the residence, it would be necessary for Officer Carter to attempt to get a search warrant, and that during that time, he would secure the premises and no one could come or go until the attempt to obtain the warrant was completed [R.T.20, lines 24-27].

Mr. Bolton testified that he first said no to the search request [R.T.63, line 14, November 25, 1970]. He further testified that he was frightened and confused and that his ultimate consent was not freely given. The officer's testimony substantially coincides with Mr. Bolton's on the matters of the consent, confirming that in the course of conversation prior to consent, Mr. Bolton said, "I don't know what to say". [R.T. 42, lines 2-5 and R.T. 63, lines 24-25, November 25, 1970.] After some type of consent was obtained, the officers then immediately went to the closet and looked into the top box of the

stack of boxes. He could smell what appeared to be unburned marijuana. [R.T. 21, lines 14-16.] He then opened the box and observed the top box to be full of what appeared to be kilos of marijuana wrapped in white paper and corregated type plactic [R.T.21, lines 16-19]. Thereafter, he arrested the defendant and conducted a search of the premises. Officer Carter removed the first box from the closet, Officer Morgan removed some other boxes. [R.T. 66, lines 8-9.] Officer Carter observed some additional contraband being removed from beneath the stove or icebox in the kitchen. It was a tray containing miscellaneous small bags of plant material appearing to be marijuana [R.T.67, lines 24-27.]

Mr. Bolton was formally arrested at this time and was charged with possession of marijuana for sale, a violation of California Health and Safety Code §11530.5.

I

THE CONSTITUTION GUARANTEES THAT THE ACCUSED SHALL ENJOY THE RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM AND TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR.

Both the right to confront adverse witnesses and the right to compulsory process for obtaining favorable witnesses as provided by the 6th Amendment, are fundamental elements of due process of law. Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920 (1967).

The informer in this case is such a person as is contemplated by the 6th and 14th Amendments. Unquestionably, the informer's statements to the police led to Petitioner's subsequent arrest and conviction. Yet, the informer was allowed to tell his story in a small police office, a castle for the prosecution. There, his testimony was heard and acted upon. Then like a will-o-

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A. The Court's refusal to require disclosure of the informant's identity denied Petitioner's right to a fair trial and due process by preventing him from having the opportunity to discover material evidence that could be used in his defense.

California Evidence Code §1041 provides that the police may refuse to disclose the identity of informers in certain situations. The situation here in question, is does the public interest outweighs the "necessity for disclosure in the interests of justice." California Evidence Code § 1042 (d)

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provides a practical method for a court to determine if the §1041 assertion is proper. Such a showing can be made outside the presence of the jury and of defendant and his counsel. But it is implicit that some showing be made.

The court acted in a manner such as to give §1041 the effect of a presumption, i.e., unless the defense shows clear materiality, the appropriate prosecution witnesses can refuse to disclose the identity of informants. However, the statute should only have this effect after the court has considered and determined that the necessity of non-disclosure outweighs the necessity for disclosure.

There was no consideration or weighing in the preliminary or in the special hearing. Once the police officer refused to identify the informant at the preliminary hearing, the discussion shifted to materiality of the informant as a witness, at the special hearing,

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as a manner of objecting to the use of the §1041 privilege, though an objection for lack of foundation was made at the 1538.5 hearing [see R.T., p.55, lines 14-15, from November 25, 1970].

The simple suggestion by a police officer that if the informer's name were divulged, his life might be in danger certainly cannot adequately satisfy the public interest requirement of Section 1041, or otherwise informants names could routinely be withheld by the mere pronouncement of a few ritualistic words. Here it is vigorously urged that a particularized and cogent evidentiary showing be made before the defense is foreclosed from ascertaining, (1) whether there was in fact an informant, (2) whether that informant furnished the information he is alleged to have provided, (3) how that information was obtained, and (4) how credible was the information. Cf., Priestly v. Superior Court, supra

(concurring opinion of Justice Carter).

The public interest which was supposedly being protected, is nebulous, indeed.

The defense, as a manner of objecting to and countering the assertion of §1041 privilege, for the most part used the materiality tact. The police officer who testified [Officer Carter] stated that he had not seen the informant before [R.T., p.26, lines 10-11], had made no attempts to locate him [R.T., p.26, lines 12-13[, and did not know where to find him [R.T., p.26, lines 19-24].

Upon these facts, what public interest is being protected? Clearly, when an informer is part of a grass roots level of police information gathering, i.e., a constant source or known friend of the police, the public interest may be strong. But in this case, the informant was not routinely in touch with the police, and not a constant source of information. How can one tip outweigh the

the Constitution of the United States?

The test for disclosure is whether there exists a reasonable possibility that the informer could give evidence which might result in the defendant's exoneration. People v. Price, 1 Cal. 3d 836, 83 Cal Rptr 369 (1970). In Honore v. Superior Court of Alameda County (1969) 70 Cal. 2d 162, 74 Cal Rptr 233, 449 P. 2d 169, the Court said: "Defendants need not prove that the informer could give testimony favorable to them in order to compel disclosure of his identity nor need they show that he was a participant in or an eyewitness to the crime...Their burden extends only to a showing that the informer would be a material witness on the issue of guilt and non-disclosure of his identity would deprive the defendant of a fair trial."

In Rovario v. United States (1957) 353 U.S. 53, 77 S. Ct. 623, an informer who had

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In Roviaro v. United States (1957)
U.S. 53, 77 S. Ct. 623, an informer who

solicited a sale of heroin drove the defendant to a location where defendant picked up a package, handed it to the informer and then was arrested. Unless Rovario gave up his constitutional right not to take the stand in his own defense, the informer was the one witness whose testimony might have disclosed an entrapment. The Court said that cross-examination of the police "was hardly a substitute" for an opportunity to examine the informer. Rovario's conviction was reversed for failure to disclose the identity of the informer.

Here Petitioner Bolton was forced to take the stand and testify where, if the informer had been available for questioning particularly on the issue of probable cause, he (Bolton) might not have been forced to testify. If the informant had been summoned forth and failed to support the prosecution's grounds for the search, the case may well have ended prior to the case ever reaching the

merits.

It seems clear that at the very best, the State did not make a convincing showing that the public interest was strong and outweighed the Constitutional notions of due process.

There also remains the question of the validity of those portions of the California Penal Code which allow the denial of the fundamental elements of a fair trial. Is any showing strong enough to override the United States Constitution?

II

THE CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES MUST BE JEALOUSLY GUARDED BY THE JUDICIARY.

The development of our society as reflected by the United States Supreme Court evidences an ever growing concern for individual rights in an ever more complex and demanding society. This interest is most clearly present in the line of cases beginning with Mapp v. Ohio, 367 U.S. 643, 81 S. Ct.

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1684 (1961), which extended 4th Amendment protections to the states. Today, searches without warrants can be conducted in only a few well delineated situations. See Coolidge v. New Hampshire 403 U.S. 443, 91 S. Ct. 2022 (1971). These protections cannot be abandoned. They must be kept under a watchful eye, lest they be subverted during an unwary moment.

A. Consent to search requires a knowing, intelligent waiverof a Constitutional privilege, untainted by fear, duress, or overmastering influence.

The age old proposition that the burden of proving voluntariness of a consent to search is on the prosectution was stated by Mr. Justice Stewart in Bumper v. North Carolina, 391 U.S. 543, 548 (1967). As the court stated in Judd v. United States (D.C. Cir. 1951) 190 F. 2d 649, 651, "The Government must show a consent that is 'unequivocal and specific' [citation], 'freely and intelligently given.' [Citation] Thus 'invitations' to enter one's

house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. [Citation.] A like view has been taken where an officer displays his badge and declares that he has come to make a search [citation], even where the householder replies 'All Right.' [Citation.]...Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent." In accord, Channel v. United States (9th Cir. 1960) 285 F. 2d 217, 219, 221.

The testimony at the special 1538.5 hearing indicates the inherent coercion of Petitioner's consent.

Petitioner Bolton testified to the effect that he refused permission to search the premises initially, that four or five officers were inside his premises while

Officer Carter repeated his demands. Furthermore, he stated that he was frightened and confused, and that he had openly said that he was not sure of his rights, did not know what to do, and that the officers on the other hand offered to say it (consent) for him. [C.T., pp. 63-64, July 8, 1970.]

Of greatest significance is the statement by Officer Carter to the effect that if the defendant did not consent, they would get, or attempt to get (the witnesses testimony is conflicting), a search warrant and that until that time, the officers would secure the premises and not let the defendant go anywhere, as testified to by the defendant [C.T., p.64, line 1 on July 8, 1970], or as testified to by Officer Carter at the Preliminary Hearing [C.T., p. 20], "secure the premises and no one could come or go until the attempt to obtain the warrant was completed". [emphasis added]

Furthermore, Bolton, though admittedly saying something in the nature of it being all right to search at the end of repeated demands, testified that in addition to his fright and confusion, he never freely consented or intended to let them search; he felt he had no choice and was coerced into it. [C.T., pp. 65-66, from July 8, 1970.]

It is manifest from all the testimony that there were repeated demands. The officers testimony is vague as to what Petitioner's state of mind was, but Officer Carter does admit that Petitioner "didn't know what to say". [C.T., p.42 on July 8, 1970].

In the case of Lane v. Superior Court 271 Cal. App. 2d 821, 76 Cal. Rptr. 895 (1969), the court noted that when a defendant does not mean what he said, the consent will not be deemed to be freely given. The testimony of petitioner Bolton, combined with the

officer's recalling Bolton's uncertainty, show the lack of intent of the petitioner to consent.

The most troublesome aspect of the alleged consent is that the petitioner was effectively under arrest at the time the police approached him. Petitioner Bolton testified that Officer Carter said that if he did not consent, that until a warrant was obtained, no one could come or go. Additionally, the officers gave him Miranda warnings at the time they came to the door and first spoke to him.

In People v. Hatcher, 2 Cal. App. 2d 71, 82 Cal. Rptr. 323 (1969), the court, in discussing the illegality of the detention of a car thief, defined arrest to be (1) the taking of a person into custody and (2) the actual restraint or submission to custody.

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unless he consented to a search which he knew would definitely result in his arrest.

Petitioner urges that should it be found that he was under arrest at the time the police sought his consent, then such arrest was illegal, being based on information from an informant not ascertained to be reliable and upon exterior observations of actions which were meaningless in themselves and in conjunction with the information received. See People v. Hamilton, 71 C. 2d 176, 77 Cal. Rptr. 785 (1969), on the necessity of a reliable informant.

The most that one can determine from the information given the police that was corroborated by their observations was that Petitioner Bolton was at the named address and that there was a large carton in his closet.

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valid because it is inextricably bound up with the illegality of the arrest. People v. Haven, 59 Cal. 2d 713, 31 Cal. Rptr. 47, 381 P.2d 927 (1963).

Petitioner further contends that regardless of whether it is determined he was under an unlawful arrest at the time consent was given, that the assertion of the police that he would be detained is an insurmountable element of coercion.

B. A search incident to an arrest must bear a rational basis to its stated purpose.

One of the few exceptions to the requirement that a warrant be obtained as a prerequisite to a search, is a search incident to an arrest. Such a search must be limited to the person arrested and that part of the room where he was arrested which is in his immediate control and within his reach. Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034 (1969). The

rational underlying the rule is to prevent the arrestee from destroying evidence or grabbing a weapon. Clearly no such possibility exists here. Petitioner was unclothed, so there was only a need later to check the clothes he put on to go to the police station, for possible weapons. As to searching the area from which he could immediately destroy evidence or grab a weapon, this was superfluous. Five officers surrounded petitioner and even if there was a fear of violence, or destroying evidence, which there wasn't, the most efficient and least intrusive alternative would be to handcuff the suspect and put him in a police car. Certainly the police learn many ways to quickly subdue and render harmless violent people. Searching a closet and letting the suspect stand there, is not one of those ways.

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examined. For example, here the officers obviously thought the closet contained contraband. They made petitioner stand nearby while the rest of their squad "guarded" him. After the police found the contraband, they arrested him. This sort of activity is not in the spirit of protection of individual rights that is the force behind cases such as Chimel. More preferrably, the Court should apply the Chimel rational logically and require that once an individual is arrested and in control, a warrant be obtained before any search is conducted, excepting exigent circumstances.

C. With or without a warrant, a search or an arrest must be supported by probable cause.

"Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Katz v. United States, 389 U.S. 347, 359, 88 S. Ct.

507, 515 (1967). This expectation of privacy is even stronger in a person's home. "A belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant." Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969 (1970). The exception under which the People attempted to justify the search was that Petitioner consented. This is the theory that the trial court considered. The issue was squarely raised by Petitioner's opening brief on appeal to the California District Court of Appeal, Second Appellate District on pages 21 to 26. Respondent's brief in the same court dealt with the matter on pages 30 to 35. However, the District Court of Appeal opinion made no mention of the issue. Instead, that court justified the search on the grounds that there was probable cause to arrest Petitioner and the search was incident

to a lawful arrest. Does this imply that the consent was inadequate and that a new theory had to be found to support the search? No such argument exists in Respondent's brief for the District Court of Appeal. If the old theory of consent still retains vitality, it has been dealt with elsewhere in the Petition. If the new theory, search incident to a lawful arrest, is more vital, then an examination of the probable cause to arrest is necessary.

The District Court of Appeal sustained the arrest on the basis that the informer had said Petitioner possessed marijuana and that the police had corroborated the tip by their own observation. This informant was a stranger, an apparent one-shot type. There was no way to test his reliability and no information as to the quality of his information. Did he gain the knowledge personally, or was it a rumor he had heard or a guess on his part? This clearly would not be enough

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to obtain an arrest warrant or a search warrant. The corroboration of the police consisted of watching Petitioner move around his house, go to the closet (where else do you get shirts, pants, etc.), and be visited by a few friends. The police say they saw someone, not Petitioner, handle an opaque, white container the size of a kilogram of marijuana, however, they must not have been very sure of themselves, since they could have then lawfully made an arrest if their belief was reasonable. Instead, they waited and later arrested Petitioner when he was alone. If their belief was insufficient earlier and not enough in conjunction with the informant's information earlier to arrest anyone, why was it sufficient hours later when the one whom they saw handling the suspected package had gone? It is obvious that the police themselves, did not think they had probable cause. Otherwise, why the delay and why ask for Petitioner's

consent. Since no one or nothing went in or out of the house after the person whom they had seen with the suspected package left, why didn't the police obtain a search or arrest warrant in the intervening hours before they searched and arrested Peititioner? Nothing changed, and they certainly had the opportunity to get a warrant. The threat to "secure the premises" until they got a warrant was a bluff. This is just the type of bluff the United Supreme Court should call.

III

A SENTENCE BASED ON EVIDENCE WHICH IS LATER EXCLUDED, IS UNUSUAL AND IMPERMISSABLE PUNISHMENT.

Our system of justice suffers any time an accused is treated unfairly. Brady v. Maryland 373 U.S. 83, 83 S. Ct. 1194 (1963).

Here Petitioner has been treated in a machine like way, his sentence affirmed with no apparent realization that most of

the evidence was excluded.

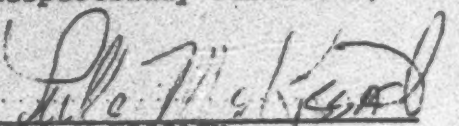
The District Court of Appeals excluded all of the marijuana seized, except for the very top layer in the top box, which was the only part within reach of Petitioner. The Appeal Court relied on Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034 (1969) in excluding approximately 90% of the seized contraband. However, the same court ruled that the illegal part of the search was "harmless federal constitutional error."

The delimma Petitioner, who has an unblemished past, has been placed in is that he has been sentenced to state prison for possession of marijuana, when most of the evidence against him was excluded. It seems so unusual not to at least remand the case for redetermination of sentence as to be a violation of the constitutional protection against unusual punishment.

CONCLUSION

The Petition for Writ of Certiorari, Petitioner respectfully prays, should be granted and the judgment reversed, or the case remanded for redetermination of sentence.

Respectfully submitted,



LUKE McKISSACK
Attorney for Petitioner

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Respectfully submitted,

[redacted]

Attorney for Petitioner

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

[illegible] WALTON,

Defendant and Appellant.

2d CRIM. NO. 20237
S.C. Co. No. A-908 647

FILED

[illegible]

APPENDIX "A"

[illegible] from a judgment of the Superior Court of [illegible] County, Hampton Hutton, Judge. Affirmed.

[illegible] for Defendant and Appellant.

[illegible] Younger, Attorney General, Herbert L. Ashby, [illegible] Attorney General, William E. James, Assistant [illegible] General, and Frederick R. Miller, Jr., Deputy Attorney [illegible] for Plaintiff and Respondent.

[illegible] Davidson Walton appeals from a judgment of conviction of possession of marijuana. (Health & Saf. Code, §

APPENDIX "A"

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
JOHN DAVIDSON BOLTON,
Defendant and Appellant.

2D CRIM. NO. 20232
Sup. Ct. No. A-008 64

FILED
MAY
Deputy Clerk

APPEAL from a Judgment of the Superior Court of Los Angeles County. Hampton Hutton, Judge. Affirmed.

Luke McKissack for Defendant and Appellant.

Evelle J. Younger, Attorney General, Herbert L. Ashby, Chief Assistant Attorney General, William E. James, Assistant Attorney General, and Frederick R. Miller, Jr., Deputy Attorney General, for Plaintiff and Respondent.

John Davidson Bolton appeals from a judgment of conviction of possession of marijuana. (Health & Saf. Code, § 11530.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN DAVIDSON SOLTON,

Defendant and Appellant.

2d Crim. No. 10272
Sup. Ct. No. A-009

APPEAL from a Judgment of the Superior Court of Los Angeles County. Hampton Hutton, Judge. Affirmed.

Luke McKissack for Defendant and Appellant.

Evelle J. Younger, Attorney General, Herbert L. Ash, Chief Assistant Attorney General, William E. James, Assistant Attorney General, and Frederick R. Millar, Jr., Deputy Attorney General, for Plaintiff and Respondent.

John Davidson Solton appeals from a judgment of conviction of possession of marijuana. (Health & Saf. Code, § 11530.)

Appellant's first contention is that he was entitled disclosure of the informer's identity since the People never ablished that his nondisclosure was in the public interest since the informer might have been a material witness in defense.[1] Appellant's second contention is that the officers' y into his house and their search of his closet was uncon-tutional. We find no reversible error and affirm.

FACTS

On June 25, 1970 an officer of the Long Beach Police artment was informed that appellant and a Ron Diorio possessed large quantity of kilograms of marijuana and that this was t in cardboard boxes in a closet at appellant's residence at 1/2 Prospect in Long Beach. The informer also stated that ellant and Diorio intended to sell the marijuana in the East. informer described appellant as a white male hippy with g brown hair who drove a yellow and blue English Helms truck. officer checked a city directory and determined that appel-t did live at 264 1/2 Prospect in Long Beach.

1/ In this connection appellant has moved to augment the cord by adding thereto the reporter's transcript of the hear-g of his motion for such disclosure on August 14, 1970. Pur-nt to Rules 12(a) and 30 of the California Rules of Court motion is granted.

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FACTS

On June 25, 1970 an officer of the Long Beach Police
Department was informed that appellant and a Ray Diorio possessed
a large quantity of milligrams of marijuana and that this was
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appellant and Diorio intended to sell the marijuana in the east.
The informer described appellant as a white male bigger with
brown hair who drove a yellow and blue English Ford pick-up truck.
The officer checked a city directory and determined that appel-
lant did live at 284 1/2 Prospect in Long Beach.

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record by adding thereto the reporter's transcript of the hear-
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the motion is granted.

From 9:00 p.m. on June 25 until 9:00 p.m. the follow- day officers of the Long Beach Police Department watched ellant's residence. The officers observed appellant twice k the described truck by his residence. During the approxi- ely twenty-four hour period the officers looked into the ellant's front room through a large open window that faced s a public alley. One of the officers observed appellant r a closet in the room several times and once saw appellant ch into the closet. At 9:00 p.m. on June 26 the officers erved another person open the door to the closet and take ckage from one of the cardboard boxes stored there. The kage was the size of a kilogram of marijuana.

Shortly thereafter two of the officers, who were in ainclothes, approached the front door of the residence which open. After a few moments the officers saw appellant enter front room. One of the officers identified himself, dis- yed his badge and asked if appellant was John Bolton. Ap- llant stated that he was.

The officers stated that they had information that ellant had a large quantity of marijuana in his closet and ed permission to search. Two other plainclothes officers rived and the four officers stood just outside the door. At

From 5:00 p.m. on June 25 until 8:00 p.m. the follow-
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and the four officers stood just outside the door. At

this time appellant was standing three feet from the officers and within two feet of the boxes in the closet. He could have touched the boxes.

The officers then entered the house and went to the open closet where one of the officers smelled what he thought was unburned marijuana. There they saw four large boxes and one grocery bag. The flaps on the top box were folded over but were not sealed. The officers looked through the boxes and the bag to ascertain their contents. They contained large quantities of marijuana, much of which consisted of paper and plastic wrapped bricks weighing about 850 grams apiece. The top box contained 20 such bricks. After the search of the closet, the officers arrested appellant. He then showed them more marijuana in the kitchen.

As to the informer, one of the officers testified that when he met him he refused to identify himself because he feared for his life. Accordingly, on the stand the officer refused to even describe the informer.

DISCUSSION

Appellant's first contention is that he was entitled to disclosure of the identity of the informer since the People have established that his nondisclosure was in the public

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were not sealed. The officers looked through the boxes and the
bag to ascertain their contents. They contained large quantities
of marijuana, much of which consisted of paper and plastic wrap
with the bricks weighing about 850 grams apiece. The top box contained
seven bricks. After the search of the closet, the officers
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was unable to even describe the informer.

DISCUSSION

Appellant's first contention is that he was entitled
to disclosure of the identity of the informer since the People
have established that his nondisclosure was in the public

interest and since the informer might have been a material witness in his defense. We disagree.

Evidence Code section 1041 allows a police officer, among others, to refuse to disclose the identity of an informer when such disclosure is against the public interest because the necessity for preserving the confidentiality of the informer's identity outweighs the necessity for disclosing it in the interest of justice.

It will be recalled that the officer gave as his reason for his refusal even to describe the informer that the latter had refused to identify himself to the officer for fear of his life. This was a sufficient basis for the invocation of the official privilege of nondisclosure. (See People v. Marquez, 69 Cal.App.2d 393, 600.)

The interest of justice (see Evid. Code, § 1041, supra) requires, however, that where an informer is a material witness on the issue of the defendant's guilt, the People must disclose his identity or incur a dismissal. (See Eleazar v. Superior Court, 1 Cal.3d 847, 851.) The defendant need only demonstrate a reasonable possibility either that the informer at trial could give evidence on the issue of defendant's guilt of the offense

1/

ged which might result in his exoneration (see Honore v. rior Court, 70 Cal.2d 162, 168, 169, 170) or at sentence, testify in mitigation of punishment. (See Brady v. land, 373 U.S. 83, 87 [10 L.Ed.2d 215, 218].) In short, reasonable possibility exists that nondisclosure would ve a defendant of a fair trial, disclosure is required. People v. Hunt, 4 Cal.3d 231, 239.)

Appellant has failed to demonstrate such a reasonable bility. At the disclosure hearing (Evid. Code, § 1042(d)) llant's counsel argued that in view of the informer's de- d knowledge as to the amount and the location of marijuana ght know who owned it and for what purpose. Counsel also d that the informer might testify that the marijuana was ssed by Ron Diorio or someone else other than appellant. rresting officer testified, however, that the informer old him that appellant and Diorio jointly possessed the ana for sale in the East. The record does not disclose ource of the informer's knowledge - whether based on

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1/ Appellant was charged with possession of marijuana for sale (Health & Saf. Code, § 11530.5.) After conviction of offense, on motion for new trial, the court reduced his ce to the lesser necessarily included one of possession rijuana.

[illegible] was charged with possession of marijuana for [illegible] Code, § 11530.5.) After convictions at [illegible], on motion for new trial, the court reduced the [illegible] to the lesser [illegible] included one of possession [illegible]

firsthand observation and knowledge or something less immediate. We find nothing in the record nor in counsel's argument that amounts to more than speculation on the part of appellant's counsel that the informer would change his story and corroborate appellant's explanation in court of his possession of the marijuana as a favor to a specified friend who was also a friend of Mario's. (See People v. Sewell, 3 Cal.App.3d 1035, 1039.)

Appellant's second contention is that the officers' entry into his house and their search of his closet was unconstitutional. We find no merit in this contention. The officers had probable cause for appellant's arrest at the time they confronted him at the door. The informer's account that appellant possessed a large quantity of kilograms of marijuana, that was stored in cardboard boxes in his closet, was corroborated in essential respects by the officers' own observations. (See People v. Lara, 67 Cal.2d 365, 374.)

Furthermore, their entry into his house for the purpose of arresting him was accomplished in substantial compliance with the requirements of Penal Code section 844.[1] (People v.

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[1] There is some question as to whether the entry was non-consensual. We do not decide this point.

[illegible] observation and knowledge or something less immediate [illegible] nothing in the record nor in counsel's argument that [illegible] to make clear speculation on the part of appellant's [illegible] that the informer would change his story and corroborate [illegible]'s explanation in court of his possession of the nar- [illegible] as a favor to a specified friend who was also a friend [illegible]'s. (See People v. Supell, 3 Cal.App.2d 1033, 1037.)

Appellant's second contention is that the officers' [illegible]y into his house and their search of his closet was unreasonable. We find no merit in this contention. The officers had probable cause for appellant's arrest at the time they confronted him at the door. The informer's account that appellant [illegible] had a large quantity of kilograms of marijuana, that was [illegible] in cardboard boxes in his closet, was corroborated in [illegible] material respects by the officers' own observations. (See People v. Lara, 67 Cal.2d 365, 376.)

Furthermore, their entry into his house for the purpose of arresting him was accomplished in substantial compliance with the requirements of Penal Code section 844.[3] (People v.

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[3] There is some question as to whether the entry was necessary. We do not decide this point.

3 Cal.3d 992, 997-98.)

Finally their search of appellant's closet was ...tutional as incident to his arrest. Since the officers ...obable cause for appellant's arrest, they could make a ...h incident and immediately prior to his actual arrest. (People v. Fink, 5 Cal.3d 458, 463.)

A search incident to an arrest must be limited, however, ...e area within the arrestee's immediate control. This is ...rea within which he might gain possession of a weapon or ...uctible evidence. (See Chimel v. California, 395 U.S. ...763 [23 L.Ed.2d 685, 694].) At the time the officers con... ...d appellant, he was standing within two feet of the boxes ...e open closet and it was possible for him to touch them. ...the flaps were folded, they were not sealed. Under these ...umstances appellant could have reached for a weapon within ...top of the boxes or for destructible evidence such as ...s identifying the boxes as his. It was therefore permis... ...to search the area within his reach. (See People v. ...Cruz, at 463 (dictum).) This, however, was only the top ...of the top box. The search of the other layers and boxes ...he search of the grocery bag were therefore unconstitutional. ...theless, this was harmless federal constitutional error

...d.2d 992, 997-98.)

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...v. King, 5 Cal.3d 632, 643.)

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...., at 643 (dictum).) This, however, was only the top
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...each of the grocery bag were therefore unconstitutional.
...ore, this was harmless federal constitutional error

) ss.

COUNTY OF LOS ANGELES)

or there was enough marijuana apparent in the top box and in the kitchen to support the judgment of conviction of possession of marijuana. (See Chapman v. California, 386 U.S. 18 [17 L. Ed.2d 705, 710-11]; Harrington v. California, 395 U.S. 250 [23 L.Ed.2d 284, 286-88].)

The judgment is affirmed.

CURRY, J.

I concur:

SCHNEIDER, Acting P.J.

ALPERT, J.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on September 11, 1972, at Los Angeles, California.

[redacted]

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On September 11, 1972, I served the within PETITION FOR WRIT OF CERTIORARI on the Plaintiff and Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Attorney General, State of California
217 West First Street
Los Angeles, California 90012

District Attorney, Los Angeles County
Hall of Justice, Room 600
211 West Temple Street
Los Angeles, California 90012

Clerk, Court of Appeal
Second Appellate District
217 West First Street
Los Angeles, California 90012

Los Angeles Superior Court
Clerk's Office, Criminal Records
Hall of Justice, Room 448
211 West Temple Street
Los Angeles, California 90012

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on September 11, 1972, at Los Angeles, California.

Barbara M. Ramsey
BARBARA M. RAMSEY

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 511, Hollywood, California 90028. On September , 1972, I served the within PETITION FOR WRIT OF CERTIORARI on the Plaintiff and Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

Attorney General, State of California
217 West First Street
Los Angeles, California 90012

District Attorney, Los Angeles County
Hall of Justice, Room 650
211 West Temple Street
Los Angeles, California 90012

Clerk, Court of Appeal
Second Appellate District
217 West First Street
Los Angeles, California 90012

Los Angeles Superior Court
Clerk's Office, Criminal Records
Hall of Justice, Room 446
211 West Temple Street
Los Angeles, California 90012

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on September 11, 1972, at Los Angeles, California.

BARBARA M. MARSHY

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUN 15 1972

DEAR SIR: I have this day filed Order

HEARING DENIED

In re: Cause No. 20230

Rupp

vs.

Bolton

Respectfully,

G. E. BISHEL
Clerk

RECEIVED JUN 16 1972